

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9 – CINCINNATI, OHIO**

XPO LOGISTICS FREIGHT INC.,  
Employer,

Case 09-RC-262066

and

TEAMSTERS LOCAL UNION NO. 100, a/w.  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
Petitioner.

**PETITIONER TEAMSTERS LOCAL UNION NO. 100  
OPPOSITION TO REQUEST FOR REVIEW**

Pursuant to Section 102.69(c) and Section 102.67(f) of the Board's Rules and Regulations, International Brotherhood of Teamsters Local 100 ("Petitioner") files and served this opposition to the Employer's Request for Review filed September 30, 2020 in this case.

On the June 23, 2020 petition filed by Petitioner and pursuant to the Stipulated Election Agreement signed by the Petitioner and XPO Logistics Freight, Inc. ("Employer"), as approved by the Regional Director on June 25, 2020, a secret-ballot election was held by mail beginning on Monday, July 27, 2020 at 4:30 pm, among the employees in an appropriate unit.<sup>1</sup> The Tally of Ballots was served on the parties at the conclusion of the election on Tuesday, August 18, 2020.

After timely Objections, the Regional Director issued a September 16, 2020 decision, concluding: "I have further concluded that Objection 5 has merit, and it is hereby sustained, and the ballot involved counted as a yes vote. I have further concluded that Objections 1 and 2 raise meritorious issues, and they are hereby sustained. However, I will withhold decision on whether

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<sup>1</sup> All full-time and regular part-time Driver Sales Representatives (DSR) employed by the Employer at its Cincinnati, Ohio Service Center (XCN) located at 5289 Duff Drive, Cincinnati, Ohio; excluding all dock employees, maintenance employees, managerial employees, confidential employees, professional employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

the election should be set aside until the eligibility of the challenged voters has been determined. I have further concluded that the challenged ballots of Raymond Grayson and Jerry Smith raise substantial and material issues of fact that can best be resolved by hearing.”

Petitioner submits that the Employer’s Request for Review should be denied because it raises no issues meriting review.

**Objection 1.** The Regional Director properly sustained objections to the four ballots identified in Control #20, #94, #113, #120, for failure of the voter to sign the outside envelope. Under Board policy, described in *Davis & Newcomer Elevator Co.*, 315 NLRB 715 (1994), the Region had an obligation to furnish voters #20, #94, #113, #120 with a duplicate election kit. The Regional Director properly determined that the failure to follow procedure by Regional Office personnel potentially disenfranchised four eligible voters. The Employer’s claim that it has a better grasp on the ability of the Region to provide these voters with duplicate ballots, simply amounts to second-guessing the Regional Director’s judgment on the conduct of the election. Employer’s Request on this point should be denied.

**Objection 2.** The Regional Director properly determined that one voter, Control #103, whose ballot declared void because the voter signed the outside envelope by hand, but not in cursive, was disenfranchised under Board policy described in *Davis & Newcomer Elevator Co.*, 315 NLRB 715 (1994). The Regional Director properly found that the Region had an obligation to furnish voter #103 with a duplicate election kit. The Employer’s Request for Review cites to no Board precedent or policy that contradicts the Regional Director’s determination on this point. The Employer’s appeal to it’s own unique interpretation of the Case Handling Manual on this Objection fails to meet its burden under Board Rule Section 102.67(d)(1) and (2), “Grounds for review”. Employer’s Request on this point should be denied.

**Objection 5.** The Regional Director properly relied upon *Daimler-Chrysler Corp.*, 338 NLRB 982, 983 (2003), in finding that the voter casting the ballot in Exhibit 2, attached to the Regional Director’s decision, deliberately expressed a clear preference and there are no other markings that negate that choice. The Employer’s reliance on the Board’s concurrence in a Regional Director’s decision on a different ballot in a different election involving a choice between two labor organizations, is unavailing. In *Midland Steamship Line, Inc.*, 58 NLRB 1091, 1092, fn. 3 (1944), the Board explained: “This ballot was deposited in the ballot box after it had been torn into two pieces. One piece bore only the square wherein a vote for one of the participating unions was indicated.” It is unclear from this footnote concurrence as to the facts the Regional Director in that case relied upon in voiding the ballot. It is clear that the Board did not establish any precedential policy in this one line footnote in the mid-20<sup>th</sup> Century decision in *Midland Steamship Line, Inc., id.*, decided under the Wagner Act. No other published Board decision cites to or relies upon the *Midland Steamship Line, Inc.* footnote 3 concurrence for the premise asserted by the Employer. Employer’s Request on this point should be denied.

## **THE CHALLENGED BALLOTS**

Based upon the Regional Director’s decision to count the half ballot in Objection 5 as a yes vote, the vote count now stands at 55 yes, 60 no, with 2 challenged ballots and ballots from 5 voters who were not given an opportunity to receive a duplicate voting kit. “Thus, if one or both of the challenged voters are eligible to vote, the five remaining disputed ballots in Objections 1 and 2 would be sufficient in number to affect the results. To the contrary, if neither challenged voter is eligible, the remaining disputed ballots could not affect the results.” The Regional Director’s conclusion that the challenged ballots of Raymond Grayson and Jerry Smith raise

substantial and material issues, which can best be resolved by the conduct of a formal hearing, is a proper exercise of discretion. A hearing is appropriate to address the questions raised by the Employer's claims that it's managers' "oversight" caused these employees to be listed as eligible voters on the voter list. Employer's Request on this point should be denied.

## CONCLUSION

A Board supervised election must be declared a nullity when "the manner in which the election was conducted raises a reasonable doubt as to fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970); see also *Durham School Services, LP*, 360 NLRB 851, 853 (2014), enfd. 821 F.3d 52 (D.C. Cir. 2016). For the foregoing reasons, Petitioner Teamsters Local Union No. 100 submits that the Employer's Request for Review should be denied and, after hearing, the Regional Director should declare the mail ballot election in this case at XPO Logistics Freight, Inc. a nullity and undertake further appropriate actions to resolve the question concerning representative affecting interstate commerce in the above-referenced case.

Date: October 7, 2020

Respectfully submitted,

TEAMSTERS LOCAL UNION No. 100, affiliated with  
International Brotherhood of Teamsters,  
Petitioner, By Counsel:

s/ James F. Wallington

James F. Wallington (D.C. Bar # 437309)

BAPTISTE & WILDER, P.C.

1730 Rhode Island Avenue, NW, Suite 406

Washington, DC 20036

Telephone: 202.223.0723

Email: [jwallington@bapwild.com](mailto:jwallington@bapwild.com)

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITIONER TEAMSTERS LOCAL UNION NO. 100 OPPOSITION TO REQUEST FOR REVIEW was served by electronic mail upon the following representatives of the Employer XPO Logistics Freight, Inc. on this 7th day of October, 2020 as follows:

Howard H. Wexler  
Email: [hwexler@seyfarth.com](mailto:hwexler@seyfarth.com)  
Seyfarth Shaw, LLP  
620 Eighth Avenue, 32nd Floor  
New York, NY 10018

Via Electronic Filing upon:

Matthew T. Denholm, Regional Director  
National Labor Relations Board, Region 09

DATED this 7th day of October, 2020:

*s/ James F. Wallington*

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James F. Wallington  
BAPTISTE & WILDER, P.C.  
1730 Rhode Island Avenue, NW, Suite 406  
Washington, DC 20036  
Phone: (202) 223-0723  
Email: [jwallington@bapwild.com](mailto:jwallington@bapwild.com)